EQUALITY &RIGHTS ALLIANCE Ireland Can't Afford Cutbacks in Equality and Rights

Equality & Rights Alliance, C/O OPEN, 7 Red Cow Lane, Smithfield, Dublin 7
Contact: Rachel Mullen email: rachel@eracampaign.org Tel: (01) 8148860

Equality and Rights Alliance

submission

to
the Minister for Jobs, Enterprise and Innovation,
Mr. Richard Bruton T.D.
on

Reform of the State's Employment Rights and Industrial Relations Structures and Procedures

September 2011

Introduction

Equality and Rights Alliance (ERA) welcomes the opportunity to make a submission on the Minister for Jobs, Enterprise and Innovation's proposal to introduce rationalisation and reform of the fora for the resolution of individual employment rights disputes. ERA supports the Minister's drive for reform of this area, including the proposal to reduce the number of fora which are at present vested with jurisdiction to adjudicate on individual rights disputes. We further welcome and support the goal of the Minister to have a world class work place relations service and employments rights framework.

For the purposes of this submission, ERA has a particular focus on the interface of the equality infrastructure with the employment rights infrastructure and with the proposal to integrate the Equality Tribunal with the first instance body. ERA would urge the Minister to commit to ensuring that any reformed structure would constitute an enhancement of the equality infrastructure rather than a further erosion of this infrastructure.

About Equality and Rights Alliance

ERA is a coalition of 171 civil society groups (NGOs, and trade unions), academics and individual activists working together to protect and strengthen the statutory equality and human rights infrastructure.[1] ERA members have considerable experience of the employment rights infrastructure from the perspective of the claimant. Some members also have experience in representing claimants in every type of employment dispute. The ERA membership has a particular understanding of the needs and experience of people who have been discriminated against.

Key Recommendations

- Any reformed system must retain and incorporate key aspects and some of the core distinctive features of the working and function of the Equality Tribunal, outlined in detail below, to ensure that there is no diminution in the quality of the services available to victims of discrimination.
- The reform of the employment rights infrastructure must be done in a manner that is compatible with State's obligations under Article 6 of the European Convention on Human Rights, Article 47 of the Charter of Fundamental Rights of the EU and the obligations imposed by the Equal Status Act as outlined below.
- A number of key principles (outlined 1 to 6 below) should govern the reform process to ensure best outcomes in regard to addressing employment equality issues.
- ERA response to specific questions set out in the consultation document is contained in Appendix A.

[1] For a list of our member organisations : http://www.eracampaign.org/about-us

Background and Context

The equality infrastructure is comprised of the equality legislation: the Employment Equality Acts 1998-2008; the Equal Status Acts 2000-2008; and the EU Directives: Gender Equal Treatment Directive; Race Directive; Framework Employment Directive; and provisions of the EU Treaty. The Equality infrastructure is also comprised of the Equality Tribunal, Labour Court, Circuit Court and the Superior Courts.

There have been swingeing cuts to the budget of the Equality Authority.[2] This reduction significantly reduces the resources it has to provide legal representation to victims of discrimination. It is unclear at this stage what impact the proposed merger of the Equality Authority will have on the resources available to provide assistance to victims of discrimination. Discrimination cases can be extremely complex. The State scheme of legal aid and advice does not allow the provision of legal aid in cases before tribunals. Some trade unions regularly provide representation to their members in such cases. However, significant proportions of claimants before Tribunals do not belong to unions and therefore would not be able to access advice or representation before Tribunals. In any event very few trade unions have in-house legal advice available to them.

The Equality Tribunal

The Equality Tribunal is the quasi body established to investigate hear and decide claims of discrimination. It is a valued integral part of the equality infrastructure and has a number of unique features which are particularly suited to cater for the needs of victims of discrimination. The core distinctive features include:

The investigative function

In adversarial bodies, such as the traditional court settings and the Employment Appeals Tribunal, a claim is heard and decided based on the evidence and legal arguments presented by both sides. In contrast, the Equality Tribunal is given the express task not just of hearing claims of discrimination but it is also charged with investigating claims of discrimination. Equality Officers play a much more proactive and inquisitorial role than judges/adjudicators in adversarial hearings. They have the inquisitorial function of seeking the facts as well as determining the issues. This investigative role is the cornerstone of the legislation. The inquisitorial model should mean that the pursuit and defence of a claim is not wholly dependent on the ability and capacity of the individual to marshal relevant evidence and present complex legal argument. It is particularly important for claimants who are represented by groups who do not have legal training. It is also important for people who may have low levels of literacy or learning or intellectual disabilities.

The Director of the Tribunal is given a number of powers to assist in the investigation. These include powers to enter premises, require a person to produce reports, books, documents, which contain material information, inspect work in progress, and apply to the District Court for a search warrant.

[2] In budget 2009 the Equality Authority was reduced by 43% and its staffing levels have reduced from 58 to 35

Equality awareness training
In addition to training on the legislation, evidence and EU law, Equality Officers have received awareness/sensitivity training on the nine discriminatory grounds.

Investigations
Investigations are held in private, in addition in certain cases the names of the parties are anonymised. This usually occurs in cases involving particularly sensitive matters such as sexual harassment, or matters involving private matters such the sexual orientation of a claimant or the disability /medical condition that a claimant may have (this anonymity may be lost, however, if, for example, the investigation is subject to a judicial review).

Written determinations
The Equality Officer is obliged to produce a written determination. These are put on the Tribunal's website and are easily available.

Annual legal review
A valuable resource for the preparation of cases is the annual legal review prepared by the legal adviser to the Equality Tribunal. This contains a summary and breakdown of the decisions of the tribunal by discriminatory ground and area.

Amicus Curiae
A little used provision of the equality legislation is the provision requiring the Director 'to hear all persons appearing to the Director to be interested and desiring to be heard'. This allows for bodies like the Equality Authority, the Irish Human Rights Commission, NGO's or trade unions to make submissions on particular cases.

Mediation
In practice every claimant and respondent is offered the option of mediation at the beginning. This is a useful option which has a number of advantages, for example, parties may arrive at solutions that an Equality Officer would not be empowered to make. There have been some concerns about this process, however. Respondents may attend mediation with no intention or authority to settle the case. An unsuccessful mediation will add to the length of the process.

Specified orders-non financial orders
Another unique feature of the system is that an Equality Officer, in addition to making an order for compensation, may make an order that a person or persons specified in the order take a course of action so specified. Employers have been ordered to review their policies and procedures and carry out training.

Onus of proof
The equality legislation provides for the onus of proof to shift to the respondent where the claimant establishes facts from which discrimination can be inferred. It would be difficult to resolve this onus of proof provision with any proposal to resolve matters in a preliminary way over the phone (as is suggested in the consultation document).

Enforcement
A claimant can apply to the Circuit Court for enforcement of an unappealed decision of the Equality Tribunal or a final decision of the Labour Court. This is a relatively straightforward and effective procedure.

There are a number of disadvantages to hearings before the Equality Tribunal. Due to the volume of cases, there are significant delays in getting cases on for hearing. These delays are longer than the delays in other employment rights fora. The Equality Tribunal has no power to make interim orders. There are no public regular call-over of cases which would be helpful for the purposes of case management. There is no transparent process available for applying for an urgent hearing, for example, where there is an ongoing relationship between employer and employee. The Minister has not made an order setting out the procedures that should be followed in cases. There is no provision for class actions or group cases. Trade unions and NGO's cannot institute proceedings in their own names on behalf of their members.

Relevant EU and domestic requirements –Remedies, fair hearings –legal aid.- non-discrimination and reasonable accommodation

A number of provisions of EU Directives and conventions, and domestic provisions, are relevant to the consideration of the reform of the employment rights infrastructure. The EU Gender, Race and Framework Employment Directives place considerable emphasis on remedies and the need for sanctions for breaches of discrimination rights to be 'effective proportionate and dissuasive'. They also require Member States to allow trade unions and NGO's to institute proceedings in their own name. This last provision has not been implemented. The Gender and Race Directives require Member States to establish specialised equality bodies whose function must include the provision of independent assistance to victims of discrimination in pursuing their complaints about discrimination.

The Charter of Fundamental Rights of the European Union is also relevant. It applies where Ireland is implementing European Union law and thus covers a significant proportion of Irish employment law including discrimination law. Article 47 of the Charter provides:

> *"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article.*
>
> *Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.*
>
> *Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice."*

Article 6 of the European Convention on Human Rights contains similar provisions which provide:

> *"In the determination of his civil rights and obligations…, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."*

The rights contained in the Convention are now part of Irish law since the enactment of the European Convention on Human Rights Act 2003. The State is obliged to respect the rights of individuals as provided for and protected by the European Convention, EU Directives and EU Charter as appropriate.

The provisions of the Equal Status Act 2000-2008 are also relevant to any reformed system. A quasi judicial /adjudicating body will come within the scope of the Equal Status Act 2000-2008 when it is providing services to claimants who seek to appear before it. However, the scope of the Equal Status Act 2000 does not extend to the adjudicative process. Thus, the reformed body must not discriminate either directly or indirectly on any of the nine discriminatory grounds in relation to the information leaflets, submission of claim forms, procedures etc. The adjudicating body must also provide for the reasonable accommodation of people with all kinds of disabilities including physical, sensory, intellectual and learning difficulties. In certain appropriate circumstances it may be necessary for the reformed body to make provision for interpreters, and sign language interpretation.

ERA would have concerns about the enforcement of rights being resolved 'through early settlement through an administrative/executive intervention (telephone call, early meeting of the parties etc)' as suggested in the Consultation document. It is essential that a clear separation be made between employment rights disputes and industrial relations disputes.

Principles governing the reform process

The reformed system should be rooted in the following principles:

1) Recognition of the importance of, and respect for, the fundamental rights pertaining to non-discrimination and the reasonable accommodation of people with disabilities that are contained in equality legislation and Directives. The rights in question in this area are extremely important and of considerable value to the parties involved. There is considerable emphasis in the consultation document on how many cases can possibly be easily resolved either close to the workplace or early after a claim is made and insufficient consideration of the importance and value of the rights concerned,
2) The provision of remedies that are effective, proportionate and dissuasive,
3) Maximum compliance with the requirements of the EU Directives particularly in the area of remedies. In this regard the ceiling on maximum compensation should be removed in relation to any discrimination claim,
4) Maximum compliance with domestic and human rights instruments including the European Convention on Human Rights, and the Charter of Fundamental Rights of the European Union,
5) The independence and impartiality of the decision making process,
6) Equality and human rights proofing of the reformed process. This involves:
    a. Equality and human rights proofing of the information, forms, procedures, hearings, decisions, appeals and enforcement mechanisms to ensure that they do not discriminate either directly or indirectly on any of the nine discriminatory grounds,
    b. The provision of reasonable accommodation in relation to the information, forms, procedures, hearings, decisions, appeals and enforcement mechanisms to take account of all forms of disability, and to take account of language and cultural diversity. This may also

require the provision of translators and sign language interpreters in particular cases.

Functions of the Equality Tribunal under the Equal Status Act 2000- 2008

The Consultation paper issued by the Department of Jobs, Enterprise and Innovation does not refer to what is being proposed regarding the functions of the Equality Tribunal under the Equal Status Acts 2000-2008. The role of the Equality Tribunal in this regard is an extremely important one given its specialist expertise in a complex area of law and given the accessible procedures it can offer to claimants and respondents alike. ERA recommends that this issue merits further considered consultation.

Equal Status cases can be complex and precedent-setting in nature and it is vital that an accessible, independent and specialist body be retained to mediate, investigate, hear and decide on cases. ERA would be strongly opposed to the Equal Status function of the Equality Tribunal being transferred to the remit of the District Court by default.

Appendix A

Response of ERA to Specific Questions Posed in the Consultation Paper.

(Some of these matters have already been dealt with above)

ERA does not propose to answer each and every question posed but concentrates on questions that have a particular equality and human rights resonance.

Maintaining good employment relations and resolving workplace conflict

1.1. How do you think employers and employees can best be supported in resolving disputes at workplace level?

Employers and employees can best be supported in resolving disputes at workplace level in a number of ways. The resolution of workplace disputes can best be supported, in the first instance, by the prevention of workplace disputes. Employers should be encouraged and assisted in having good preventative policies and procedures in place and to apply these comprehensively. The relevant state bodies could assist in this regard by the preparation of model policies and procedures and by the provision of training this regard. The State could also assist by developing and coordinating codes of practice.

1.2. Can the provision of timely, up-to-date factual information help to facilitate early resolution of grievances/ claims and stem the flow of formal cases being submitted?

The provision of up-to-date accessible factual information on the operation of the various employment rights statutes is important in its own right and not just as a means of seeking to stem the flow of formal cases.

1.3 When and how should interventions be available from the State?

Interventions should be available from the State in the form of an accessible, independent fair hearing within a reasonable time. A system of identifying and prioritising cases such as a call-over system and preliminary hearing should be developed which could direct appropriate cases towards conciliation or mediation, particularly where there is an ongoing employment relationship or which could arrange for an early hearing of the matter.

Another useful intervention from the State/relevant state bodies would be the provision of advocacy training for NGO's representing people before the reformed structure.

Integrated structure

2.1 Do you agree that the integrated two-tier model should be adopted as guiding principle?

The integrated two tier model should be adopted as a guiding principle .However within that model it is essential that there is a clear separation between the adjudication of employment rights disputes and the resolution of industrial relations disputes. Employment rights must be resolved before 'an independent and impartial

tribunal' which conducts a 'fair hearing within a reasonable time' with 'the possibility of being advised, defended and represented'.[3]

In addition all aspects of the two tier model should be equality and human rights proofed. See above.

2.2. Do you agree that "differentiation" of processing channels should be minimised to optimise the benefits of the proposed reform and to avoid re-introduction of institutional and procedural rigidities?

and

2.3 Should all claims in respect of employment related complaints/claims (including employment related equality matters) be submitted and dealt with by one body of first instance?

All claims in respect of employment rights entitlements, including employment related equality matters, should be submitted and heard by one body of first instance. However the positive aspects of the Equality Tribunal outlined above should be incorporated into this one body. Claimants should not be required to opt between claiming discriminatory dismissal and unfair dismissal but the one body should be able to adjudicate on all aspects of the dispute.

Appointment tenure etc arrangements in new streamlined employment rights bodies

2.7. Should the arrangements for the appointment and tenure of those working in/ appointed to the new streamlined employment rights bodies be changed, and if so, what should be the guiding principles?

There is a need to ensure that specialist trained Equality Officers continue to deal with cases concerning anti-discrimination. The appointments process should be an open, independent and transparent process conducted through the Public Appointments Service with gender balance and diversity ensured. It is important that appointments to the bodies are truly independent and seen to be independent both of the governing parent departments and the political system. Appointments should be made on a permanent full-time basis so that expertise and precedent can be maintained.

Information and advice

The provision of information and awareness on rights in relation to non-discrimination and equality should be the responsibility of a body separate to and independent of the first tier body. However, the first tier body should have an information services in relation to the operation of the first tier body and in regard to its procedures and forms, and be in a position to provide information and assistance in filling in the forms.

Single Point of Entry

2.13 Should there be a single application form for all individual first instance industrial relations and employment rights complaints/claims?

[3] Article 6 of the European Convention of Human Rights and Article 47 of the EU Charter of Fundamental Rights

There should be an accessible application form and assistance should be available for the filling in of the form as required.

2.14 What measures could be taken to improve information gathering from complainants /applicants at application stage?

Claimants should be required to provide a short statement of the issues at the outset. Some claimants may require assistance in relation to this. Submissions should only be required in the case of complex points of law and a call-over system or preliminary hearing could make decisions and directions as to the identification of issues and the furnishing of submissions.

2.15 Should there be a consistent time limit for initiating all complaints/claims/appeals and if so what should it be?

There should be a consistent time limit for all claims which can be extended 'for cause'.

2.16 Do you agree that more consistent arrangements are required for the representation of claimants so as to enable individuals to nominate a person to represent them at a hearing e.g. trades union official, solicitor, other representatives, etc?

Claimants should be able to nominate a solicitor, trade union member, NGO rep to represent them. The incorporation of an investigative role for the reformed structure should facilitate claimants who are not represented.

2.17 Where the power to present/refer a complaint is currently limited to the claimant, should it be extended to include the claimant's trade union and, where appropriate, the claimant's parent/guardian?

A trade union and/or NGO should be able to make a claim in its own name and on behalf of its members. There needs to be provision made for class and group actions. The decision making body should be able to make decisions which will effect a class/group.

There is also need for a proper system of advocates to represent the needs of people with intellectual disabilities. The lodging of a claim on behalf of a person with an intellectual disability should not be confined to parents in the case of adults with intellectual or learning difficulties but should extend to recognised advocates.

Enforcement

2.18. Should there be a consistent method of enforcing awards of employment rights bodies and if so what should that be?

There needs to be a unified approach to the enforcement of employment rights decisions. The current model available under the equality legislation which allows for individuals to apply for enforcement by the Circuit Court should be maintained and extended to all employments rights legislations. In addition, the enforcement inspection remit of NERA, in regard to employments legislation, should be extended to cover other relevant legislation currently not within this remit, including, employment equality legislation and other 'family friendly' legislation such as the Maternity Protection Acts, Parental Leave and Adoptive Leave Acts.

Facilitating early intervention and alternative resolution methods
As stated earlier it is essential that there is a clear separation of the adjudication of employment rights disputes and the resolution of industrial relations disputes. The adjudication of employment rights disputes concern essential and important rights and require adjudication by an independent accessible quasi judicial body. An efficient case management system can direct appropriate matters to mediation but these methods cannot be a substitute for the adjudication of an employments rights matter. ERA would have grave concerns about such matters being resolved by phone or informal hearing as suggested in the consultation document as this would not provide adequate protection for the more vulnerable party.

There is a definite advantage in having a preliminary hearing and call-over system which would provide for efficient case management and opportunity for early settlement.

There are a number of references to matters that are 'purely factual' in the consultation documentation. It is unclear, however, who would decide what matters are purely factual. The adjudication of employment rights disputes requires the application of law to a decided/agreed set of facts. If matters are straightforward they will no doubt be resolved at an early stage.

Claimants should never be required to deal with a case on the basis of written submissions only. Some claimants would lack the capacity and resources to prepare and respond to written submissions. Written submissions may unduly lengthen a case. There may be some cases involving complex points of law where written submissions would be of assistance, but a proper call-over /preliminary hearing could identify these and issue directions in relation to the furnishing of written submissions.

Conduct of Proceedings
There needs to be a uniform set of procedures regulating the conduct of hearings at first and second tier. These need to be accessible, flexible and equality proofed.

There should be no adjudication, as to whether a matter should be dismissed because it is frivolous or vexatious, without a hearing. A vulnerable claimant may not have formulated a claim with sufficient clarity or may have omitted an essential detail. An efficient case management system could deal with such matters at a call-over or preliminary hearing

3.14 Should hearings of employment rights disputes /appeals be heard in public or in private?

Some claims involving matters of particular sensitivity or privacy, such as sexual harassment, details concerning a disability or sexual orientation should be heard in private at the option of the claimant. The practice of the Equality Tribunal to anonymise the names of the parties in such cases should be maintained. A detailed written decision with the names and identities anonymised should be publicly available nonetheless.

3.15 Should there be a uniform period for submitting appeals?

There should be a uniform period for the lodging of claims, with uniform provision for the extending the time for lodging an appeal in exceptional circumstances.